

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	

**COMMENTS OF SACRED WIND COMMUNICATIONS, INC.**

Sacred Wind Communications, Inc. (“Sacred Wind”) respectfully submits these comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry adopted by the Federal Communications Commission (“FCC” or “Commission”) on April 20, 2017 in the above-captioned proceeding.<sup>1</sup> The NPRM commences an examination of the regulatory impediments to wireless network infrastructure investment and deployment, and how the Commission may remove or reduce such impediments in order to promote the rapid deployment of advanced wireless broadband services to all Americans.

Sacred Wind welcomes the Commission’s inquiry into regulatory barriers to broadband deployment and its leadership on these critical issues. As a leading provider of voice and broadband services on Navajo lands in the State of New Mexico deploying an advanced Fixed Wireless Local Loop (“FWLL”) network, Sacred Wind has significant experience with the huge

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<sup>1</sup> Notice of Proposed Rulemaking and Notice of Inquiry, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 17-38 (rel. April 21, 2017)(“NPRM”); *see also* Order, DA 17-525 (WTB, May 26, 2017)(extending comment deadline in WT Docket No. 17-79 to Jun. 15, 2017).

costs, impediments and delays that facilities siting and rights of way access imposes on broadband deployment, particularly on Tribal lands.

## **DISCUSSION**

### **A. Background on Sacred Wind.**

Sacred Wind is a privately owned, New Mexico-based corporation formed in 2004 to introduce basic telephone and broadband services to the many thousands of unserved and underserved homes on the Navajo Reservation and near-Reservation lands in New Mexico, as well as to Navajo schools, businesses, and government locations, such as local Chapter houses. Sacred Wind is one of the only non-tribally owned rural local exchange carriers (“RLEC”) in the country wholly dedicated to serving a Tribal community, having developed a basic local and broadband infrastructure over a vast unserved tribal area of the West. Sacred Wind has a unique relationship with the Navajo Nation and with its Navajo customers, and has won national and local recognition for its approach to serving residents in a challenging geographic area.

In 2006, the company acquired from Qwest Corporation a portion of Qwest’s service territory comprising approximately 3,200 square miles in northwestern New Mexico on the Navajo Reservation and near-Reservation lands known as the “checkerboard,” as well as limited Qwest copper loop facilities in this territory. Sacred Wind serves a population of approximately 23,300, 98 percent of whom are Navajo citizens.

The population density of its service territory is about 7.3 people per square mile, one of the most sparsely populated areas in the country. A disproportionate number of Navajo households are at or below the national poverty level. The Navajo population at large is among

the highest at risk in the nation for school dropout, teen pregnancy, infant mortality, teen suicide, heart disease and diabetes.

Sacred Wind is a carrier of last resort for 6,300 households, meaning that it cannot terminate or withdraw from providing telephone service unless the New Mexico Public Regulatory Commission (“PRC”) finds that another telecommunications company is able to provide service without interruption. No other such company exists in Sacred Wind’s service area at this time.

Sacred Wind has built out an alternative to a wireline network that allows Sacred Wind to bring voice and broadband services to its service area. That alternative is an IP-based hybrid fiber/point-to-point microwave backbone network integrated with a 3.65 GHz WiMAX FWLL access network.

For remote subscribers, the FWLL system replaces the typical copper, twisted pair distribution system with a point-to-multipoint radio access network operating on a 3.65 GHz WiMax platform. System reliability on its network approaches the network reliability of Tier 1 providers – 99.999 percent reliability (or downtime of 5 minutes per year). Sacred Wind is also operating an all-IP network, using IP-based Ethernet transmission across its entire network, including the last mile, using WiMAX IEEE 802.16 equipment.

At the time of Sacred Wind’s acquisition of Qwest Corporation’s system on Navajo lands in late 2006, only 42 residential and business customers, less than 2 percent of Sacred Wind’s acquired customer base, living along the municipal boundaries of Gallup and Farmington, New Mexico, had access to DSL services at download rates between 256 Kbps and 512 Kbps. Today, the use of WiMAX technology and the managed nature of IP transmission throughout the Sacred

Wind network provide residential subscribers with wireline quality service and broadband speeds of 4 Mbps download, or higher, and some customers have access to 10/1 Mbps service. Having built a middle and last mile fixed wireless network interfaced with the older copper landlines that it acquired in 2006, and recently reinforced in areas with fiber optic middle mile, Sacred Wind has achieved its initial objectives of offering basic and advanced telecommunications services to nearly 90 percent of the Tribal homes in its service territory that have electric service.

**B. The Commission Must Renew its Focus on Permitting and Access to Rights of Way on Tribal Lands, and Take a Leadership Role Working with the Administration, Executive Branch Agencies, and Tribal Governments to Take Decisive, Concrete Steps to Address the Serious Impediments to Facilities Siting and Rights-of-Way Access on Tribal Lands.**

Sacred Wind applauds the Commission's continued focus and leadership on the critical issue of regulatory impediments to rights of way access and facilities siting. That said, noticeably absent from the NPRM and NOI is any discussion of barriers involving federal lands and permitting, particularly as it affects deployment on Tribal lands. These issues were explored fairly extensively in comments in response to the Commission's 2011 Notice of Inquiry on accelerating broadband deployment,<sup>2</sup> including in comments filed by Sacred Wind,<sup>3</sup> as well as by the Commission's Intergovernmental Advisory Committee.<sup>4</sup>

While certain issues teed up in the 2011 Broadband Barriers NOI were addressed in

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<sup>2</sup> Notice of Inquiry, *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 26 FCC Rcd 5384 (2011).

<sup>3</sup> See Comments of Sacred Wind in WC Docket No. 11-59 (Filed Jul. 18, 2011), available at <https://ecfsapi.fcc.gov/file/7021693588.pdf>.

<sup>4</sup> See Comments of Intergovernmental Advisory Committee in WC Docket No. 11-59 at 4-5 (Filed Mar. 16, 2012), available at <https://ecfsapi.fcc.gov/file/7021901497.pdf>.

follow-on NPRM's and rules adopted by the Commission,<sup>5</sup> the Commission has taken no further action since that time on federal lands and rights-of-way and permitting issues on Tribal lands, and the Commission must not lose sight of the importance of these issues to the deployment of broadband facilities on Tribal and near-Tribal lands.

The last Administration took steps to build on these efforts through a working group of federal agencies and departments (including the Commission) established pursuant to Executive Order 13616 adopted exactly five years ago,<sup>6</sup> and an associated Broadband Inventory Permitting Dashboard, which was intended to serve as a centralized source for the broadband permitting documents, policies and procedures of those agencies.<sup>7</sup> In addition, pursuant to a 2015 Presidential Memorandum on broadband deployment and adoption,<sup>8</sup> a Broadband Opportunities Council was established that was comprised of some 25 federal agencies and departments (also including the Commission) tasked with, *inter alia*, identifying and making recommendations regarding regulatory barriers within their purview that unduly impede broadband deployment.<sup>9</sup> The Commission must take this opportunity to ensure that with a new Administration, new

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<sup>5</sup> See, e.g., Report and Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, et. al., 29 FCC Rcd 12865 (2014), *aff'd*, *Montgomery County v. FCC*, 811 F.3d 121 (4<sup>th</sup> Cir. 2015) (streamlining environmental processing and review for certain wireless infrastructure).

<sup>6</sup> Executive Order 13616 -- Accelerating Broadband Infrastructure Deployment (June 14, 2012), available at <https://obamawhitehouse.archives.gov/the-press-office/2012/06/14/executive-order-accelerating-broadband-infrastructure-deployment>.

<sup>7</sup> See Permitting Dashboard, Federal Infrastructure Projects – Broadband Inventory, available at <https://www.permits.performance.gov/tools/broadband-inventory>.

<sup>8</sup> See Presidential Memorandum, Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training (Mar. 23, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/23/presidential-memorandum-expanding-broadband-deployment-and-adoption-addr>.

<sup>9</sup> See generally Broadband Opportunities Council homepage, <https://www.ntia.doc.gov/category/broadband-opportunity-council>.

leadership at the Commission, and through its newly-formed Broadband Deployment Advisory Committee, the federal government builds on these critical efforts and stays focused on all that it can do to remove barriers to facilities deployment on Tribal lands.

As the Commission is aware, Tribal lands such as those of the Navajo Nation, suffer from one of the lowest telecommunications penetration rates in the country. Broadband service coverage on Tribal lands also falls well below the national average. While 90% percent of Americans live in areas with access to terrestrial, fixed broadband infrastructure at speeds of at least 25 Mbps/3 Mbps according to the Commission's 2016 Broadband Progress Report, as the Chairman noted just yesterday in remarks to the National Council of American Indians, approximately 85% of residents of Tribal lands in rural areas lack access to high-speed fixed broadband.<sup>10</sup> As the Chairman recognized, "more work needs to be done" in order to promote broadband deployment on Tribal lands, and a key imperative is to "remove some of the regulatory barriers that have kept many deployment plans on ice and too many Tribal members offline."<sup>11</sup> If rapidly deploying new facilities and bringing broadband to Tribal lands is indeed a national imperative, then the Commission, Executive Branch Agencies, and Tribal governments must move beyond rhetoric and words, and take decisive, concrete steps to address the serious impediments to facilities siting and rights of way access on Tribal lands.

In the case of Sacred Wind, the company must obtain approvals from various federal agencies as well as from the Navajo Nation, to site its fixed wireless facilities, to bring utilities to

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<sup>10</sup> Remarks of Chairman Ajit Pai at NCAI, at 2 (Nov. 14, 2017), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0614/DOC-345347A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0614/DOC-345347A1.pdf).

<sup>11</sup> *Id.* at 3.

those facilities, and for the deployment of fiber in its network. The approval process for siting its facilities and accessing rights of way, has represented the most vexing and single greatest impediment to the efficient and rapid deployment of broadband facilities to its Navajo subscriber base. The company has applied for rights of way and easements for fiber optic cable, copper wire, fixed wireless tower and monopole sites on (i) Navajo trust and fee lands; (ii) federal government land managed by the Bureau of Indian Affairs (“BIA” or “Bureau”), Bureau of Land Management, and United States Forest Service; (iii) State of New Mexico lands, including state transportation department easements, county roadways, city government easements, and city-owned utility poles; and (iv) private lands – the so-called “checkerboard” patchwork of land ownership that changes land section-by-section from one jurisdiction to the next over its Navajo service territory.

This patchwork of federal, state, and local regulation has hampered significantly Sacred Wind’s access to vital rights of way and created substantial impediments to efficient and timely deployment. It is no less true than it was six years ago when Sacred Wind urged in its comments to the Commission to the 2011 Broadband Deployment Barriers NOI that coordinated national action is absolutely critical to addressing these issues.

Acquiring access to rights of way and communications sites represents the critical first step for all infrastructure projects. For Sacred Wind, BIA oversees and controls rights of way access for many Tribal lands, including those of the Navajo Nation. Often the BIA, state, and Tribal authorities maintain no written set of procedures or requirements governing the permitting process on which an applicant can rely. As a consequence, applicants like Sacred Wind learn

through trial and error the procedural benchmarks and obligations mandated by a particular authority.

Not only may the requirements differ from one regulating authority to the next, but from one BIA office to another and from one BIA employee to another. This lack of regulatory consistency often leads to application delays for Sacred Wind's projects. This has been particularly evident at the BIA realty office level where rights of way access on Navajo lands are reviewed and approved and where even minor ministerial issues can result in unnecessary and inordinate delays.<sup>12</sup>

Overall, a central issue in Sacred Wind's interactions with the BIA is the Bureau's rigid interpretation of its authority under its regulations, 25 C.F.R. § 169, governing rights of way access on Tribal lands. While BIA updated its regulations in 2015 with the intent of streamlining the rights of way approval process on Tribal lands, under those rules, Sacred Wind and all Tribal providers are still required to obtain approvals from both Tribal governments and BIA for rights of way access on Tribal lands. The BIA draws no distinction between applications involving the use of Tribal lands for the benefit of the Tribe's members.

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<sup>12</sup> As just one example, Sacred Wind has "Joint Attachment Arrangements" with five different electric utility companies within its service area. These formal agreements would allow Sacred Wind to attach its cables to the utilities' poles. However, before attaching the cables to the poles, Sacred Wind must obtain a telecommunications easement from the appropriate jurisdiction, to supplement the existing electric utility easements. In addition, under the BIA's current interpretation of the access rules, the Bureau ignores the existing easement on the poles and requires the applicant to satisfy all of the procedural requirements for establishing a new easement, even though the easement covers an existing utility corridor. Thus, the applicant must conduct a new Cultural (Archaeological) Resource Survey, an Environmental or Biological Resource Survey, a Land Centerline Survey, an Appraisal, and obtain the written permission of any leaseholders or users of the underlying property. These new surveys and requirements may push back the start date of a simple telecommunications cable attachment project for two or more years, delays that would never be countenanced for deployment projects in rights of way in more developed areas, and indeed which fly in the face of deadlines adopted by the Commission for telecommunications pole attachments.



Sacred Wind is a carrier holding a Certificate of Public Convenience and Necessity issued the New Mexico PRC in accordance with state law and rules intended to protect consumer interests. The State regulates certificated carriers to ensure quality services offered at reasonable rates from certificated providers of water, gas, electrical power, and communications. The BIA rules currently do not recognize certificated carriers serving Tribal lands, other than as a “utility” in it rules for issuing a service line agreement. As with entities wholly-owned by Tribal governments,<sup>13</sup> BIA can and should recognize certificated carriers serving Tribal lands as a special category and create rules and instructions for permitting and easements for certificated carriers that provide communications services, including broadband, on Tribal lands.

The right of way process for the placement of a communications cable or tower on Tribal land to exclusively serve members of the Tribe is treated no different than a communications tower or landline route on Tribal lands dedicated to providing service to an adjacent highway or carrying bandwidth across a Reservation to serve non-Tribal areas. The BIA’s management of the rights of way application process appears designed to limit outside encroachment on Tribal lands. While this may be a laudable goal, it should not come at the expense of developing broadband infrastructure on Tribal lands that is intended to serve the Navajo people. In Sacred Wind’s view, the BIA must better balance the management of Tribal lands with the protection of and service to the Navajo people. These processes and requirements may be streamlined from time to time, but for Sacred Wind the time and expense to navigate and fulfil the Tribal lands

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<sup>13</sup> See 25 CFR § 169.4(b)(3).

regulatory requirements within Sacred Wind's territory will remain at the forefront in determining the placement of broadband infrastructure.

### **C. CONCLUSION**

Sacred Wind recognizes the Commission's leadership in bridging the Digital Divide in Indian Country. And Sacred Wind has and will continue advocating for regulatory reforms in state, federal and Tribal forums to bring the highest level of broadband to Navajo customers on Tribal Lands. We urge the Commission to renew its focus on permitting and access to rights-of-way on Tribal lands, and take a leadership role, working with the Administration, key federal agencies and departments, and industry stakeholders to take decisive, concrete steps to address the serious impediments to facilities siting and right-of-way access on Tribal lands.

Respectfully submitted,

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